Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *A. A. v. Canada Employment Insurance Commission*, 2018 SST 1139

Tribunal File Number: AD-18-727

BETWEEN:

A. A.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: November 9, 2018

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant, A. A. (Claimant), applied for Employment Insurance regular benefits, claiming that her employer did not contact her to return to work after she sought a meeting to resolve a conflict with another employee. The employer prepared a Record of Employment, stating that the Claimant had quit.[1] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant had voluntarily left her employment without just cause and that voluntarily leaving was not her only reasonable alternative.[2] The Claimant argued that she had not quit her employment, but the Commission maintained its position on reconsideration.[3]

[3] The Claimant appealed the Commission's reconsideration decision to the General Division. The General Division dismissed the appeal, having found that the Claimant had voluntarily left her employment, that she did not have just cause for voluntarily leaving, and that there were reasonable alternatives to leaving. The Claimant now seeks leave to appeal the General Division's decision on the ground that "she did not quit" her employment. I must decide whether the appeal has a reasonable chance of success, namely whether there is an arguable case on any of the grounds that the Claimant raises.

ISSUES

[4] There are two issues before me:

> Issue 1: Is there an arguable case that the General Division failed to apply the correct legal test when it found that the Claimant had voluntarily left her employment?

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[1] Record of Employment, at GD3-13 to GD3-14.
[2] Commission's letter dated February 13, 2018, at GD3-47 to GD3-48.
[3] Commission's reconsideration decision dated March 14, 2018, at GD3-58 to GD3-59.

Issue 2: Is there an arguable case that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it when it found that the Claimant had voluntarily left her employment?

ANALYSIS

[5] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[6] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the grounds of appeal set out under section 58(1) of the DESDA and that the appeal has a reasonable chance of success. This is a relatively low bar. Claimants do not have to prove their case; they simply have to establish that the appeal has a reasonable chance of success based on a reviewable error. The Federal Court endorsed this approach in *Joseph v Canada (Attorney General)*.[4]

Issue 1: Is there an arguable case that the General Division failed to apply the correct legal test when it found that the Claimant had voluntarily left her employment?

[7] No. I am not satisfied that there is an arguable case that the General Division failed to apply the correct legal test when it found that the Claimant had voluntarily left her employment.

[8] The Claimant submits that the General Division erred in law when it determined that she had voluntarily left her employment. She denies that she quit. She acknowledged that the

[4] *Joseph v Canada (Attorney General)*, 2017 FC 391.

employer did not formally dismiss her but argues that the employer effectively dismissed her because he did not contact her to return to the office.

[9] The General Division identified the test for determining whether the Claimant voluntarily left her employment as whether she had a choice to stay or leave. The General Division cited *Canada (Attorney General) v Peace*[5] where the Federal Court of Appeal held that, under section 30(1) of the *Employment Insurance Act*, the question to ask to determine whether an employee has voluntarily left their employment is whether the employee had a choice to stay or to leave. The General Division properly identified the legal test. The General Division also properly determined that the Commission had the burden of proof to show that the Claimant had voluntarily left her employment.

[10] After identifying the test it would be applying, the General Division determined whether the Claimant had a choice to stay in or to leave her employment. The General Division noted the Commission's position. The Commission had contacted the employer, who relayed that the Claimant had quit, without allowing the employer a reasonable period to implement any necessary changes. The General Division found that the Claimant could have remained in her position until she spoke with the owner and a meeting was scheduled. The General Division also found that, because the Claimant had the owner's cell phone number, she could have contacted him directly to resolve any issues and to clarify her employment status. In summary, the General Division properly applied the legal test for voluntary leave. I am therefore not satisfied that there is an arguable case that the General Division erred in law when it determined that the Claimant had voluntarily left her employment.

Issue 2: Is there an arguable case that the General Division based its decision on an erroneous finding of fact when it found that the Claimant had voluntarily left her employment?

[11] No. I am not satisfied that there is an arguable case that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it when it found that the Claimant had voluntarily left her employment.

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[5] *Canada (Attorney General) v Peace*, 2004 FCA 56.

[12] The Claimant suggests that the General Division made an erroneous finding when it concluded that she had voluntarily left her employment. She maintains that she did not quit her employment and argues that the General Division disregarded the fact that it was an unsafe and toxic place to work. She notes that her supervisor (who was also the office manager) was "emotional, confused [about their respective roles] and very mad" and that she had instructed the Claimant to "go home and wait for [the owner] to call."[6] This is consistent with the reasons the Claimant provided in her notice of appeal to the General Division, where she added that she had wanted a meeting with the owner and her supervisor. She testified at the General Division hearing that she had wanted a meeting so that the three of them could sort out her role and her supervisor's role.[7] She waited for the owner's telephone call but, when she did not hear back, assumed that she no longer had a job.

[13] The Claimant asserts that the General Division erred by accepting the employer's position (as relayed to the Commission), as set out in paragraph 19 of the General Division's decision. The Commission submitted that the Claimant had left her employment without discussing the situation with the employer and without providing the employer with a reasonable period to implement any changes that may have been required. The Commission noted that the employer had stated that he was unaware of any problems regarding the Claimant's employment because she had mentioned that "everything was good,"[8] but, when he returned the following week, the Claimant informed him that "things were not working out and that she was quitting."[9]

[14] The Claimant argues that, basically, the General Division overlooked her evidence or mischaracterized what occurred.

[15] The General Division was mindful of the Claimant's evidence. In particular, it acknowledged that the Claimant denied that she had voluntarily left her employment and that the office manager had advised her against returning until the owner contacted her. However, the employer provided conflicting evidence. In the face of this conflicting evidence, the General Division had to assess and decide whose evidence it preferred.

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[6] Application to the Appeal Division – Employment Insurance, at AD1-4.
[7] At approximately 6:50 of audio recording of General Division hearing.
[8] General Division decision, at para 19.
[9] *Ibid*.

[16] As the trier of fact, the General Division is in the best position to assess the evidence before it and to determine the appropriate amount of weight to assign. I note that, in *Hussein v Canada (Attorney General)*,[10] the Federal Court held that the "weighing and assessment of evidence lies at the hearing of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference." In this regard, it would be inappropriate for me to second-guess the General Division and ask whether it should have weighed the evidence differently, when it is apparent that it considered all of the evidence before it.

[17] Ultimately, the General Division preferred the employer's documented statements that the Claimant had quit to the Claimant's evidence because both the owner and the supervisor "were in agreement," [11]and it "put more weight on two statements as opposed to one."[12] The General Division determined that the Claimant simply failed to provide corroborating evidence.

[18] At the same time, it is clear that the member was skeptical that the Claimant would not have attempted to return to work or to contact the employer at an alternate telephone number if she believed she was still employed. The General Division found the Claimant's actions consistent with voluntarily leaving her employment.

[19] As a footnote, I stress that the trier of fact should be guided by the quality—rather than the quantity—of the evidence before it, even if one witness corroborates the evidence of the other witness. After all, witnesses may have the opportunity and motivation to coordinate their statements. The trier of fact should also guard against immediately rushing to accept such statements when they come in the form of hearsay and have not been tested or subjected to any cross-examination. The trier of fact should also determine whether a party's evidence is consistent over time. In this case, although the Claimant's evidence was consistent, the General Division concluded that the statements of the owner and supervisor were also consistent, and it was on that basis that it preferred the owner's evidence.

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[10] *Hussein v Canada (Attorney General)*, 2016 FC 1417.
[11] General Division decision, at para. 14.
[12] *Ibid*.

[20] It cannot be said that the General Division based its decision on erroneous findings made without regard for the material before it when it reviewed and assessed the conflicting evidence and came to a determination that was consistent with the evidence that it preferred.

[21] If the Claimant is requesting that the Appeal Division reassess the matter and accept her assertions that she did not quit or voluntarily leave her employment, I am unable to do so under section 58(1) of the DESDA. The section sets out limited grounds of appeal and does not provide for any reassessments as a ground of appeal.

CONCLUSION

[22] I am not satisfied that the appeal has a reasonable chance of success or that there is an arguable case on any of the grounds that the Claimant has raised. Accordingly, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

PARTY:	A. A., Applicant